WO

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Ivy A. Love, Plaintiff, vs. Phelps Dodge Bagdad, Inc., Defendant.	No. CV-03-01399-PCT-MHM **ORDER**

Plaintiff, a former employee at Defendant Phelps Dodge Bagdad, Inc. ("Defendant" or “Phelps Dodge”), has filed an amended complaint asserting claims based on age discrimination in employment, in violation of the Arizona Civil Rights Act (“ACRA”), A.R.S. § 41-1463(B)(1)(Count One); age discrimination, in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a)(1) (Count Two); sex or gender discrimination, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq. (Count Three); and wrongful discharge based on retaliation for exercising rights under Arizona's workers compensation laws, in violation of A.R.S. § 23-1501(3)(c)(iii)(Count Four). Plaintiff was 52 years of age at the time of the employment action at issue in this case. (Doc. 31).

Defendant has filed a motion for summary judgement as to all claims, supported by a legal memorandum and separate statement of facts ("Defendant's Statement of Facts" or

"DSOF"). (Doc. 39, 40). Plaintiff has filed a response supported by legal argument and a separate statement of facts ("Plaintiff's Statement of Facts" or "PSOF") (Doc. 46, 47), and Defendant has filed a reply. (Doc. 49). The Court heard oral argument on Defendant's motion for summary judgment on August 8, 2005. The Court enters the following Order on Defendant's motion for summary judgment.

I.

Standard of Review.

A motion for summary judgment may be granted only if the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). To defeat the motion, the non-moving party must show that there are genuine factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511 (1986). The party opposing summary judgment "may not rest upon the mere allegations or denials of [the party's] pleadings, but ... must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e). See also, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1356 (1986).

II.

Background Facts.

Plaintiff commenced working for a predecessor company in 1972. Plaintiff became a Supervisor for Defendant Phelps Dodge in 1991. She held this position until August 2002 when her employment was terminated. Plaintiff received training in company policies and procedures and in related personnel matters.

Defendant's investigation into racial harassment on Plaintiff's crew and Plaintiff's issuance of counseling records.

In May 2002, during a communications meeting attended by Mine Superintendent Kent Cramer and members of Plaintiff's crew, truck driver Jorge Angeles complained that he was being racially harassed by fellow crew members. (Doc.40, Exh. 2 - Kent Cramer

affidavit). Representatives of Defendant's Human Resources ("HR") Department commenced an investigation into Mr. Angeles' complaint and by the end of July 2002, determined there was racial tension in Plaintiff's crew. (Cramer affidavit; Doc. 40, Exh. 3 - affidavit of HR Manager Linda Tanton).

Defendant has set forth a factual summary of the incidents that came to light during the investigation. (DSOF at para. 9). Plaintiff objects to this discussion on hearsay grounds. (PSOF at para. 9). This information may be admissible at trial to show course of conduct on the part of Defendant's employees. Defendant also may present witnesses who can testify as to these incidents based on first-hand knowledge. The Court has considered the information to the extent it can be based on personal knowledge or could be presented in an admissible form at trial. See Fraser v. Goodale, 342 F.3d 1032, 1036-37 (9th Cir. 2003)(contents of plaintiff's diary considered on summary judgment; "[a]t the summary judgment stage, we do not focus on the admissibility of the evidence's form").

The cited incidents included the following. Mr. Angeles and Mr. Jose Tarango, a fellow crew member, complained about being "rough loaded" by Caucasian shovel operators; Mr. Angeles complained that he had been struck on two occasions by a specific Caucasian shovel operator; Caucasian employees used the public radio system to criticize Mr. Angeles' work performance; and Caucasian employees had made derogatory comments in reference to Hispanic ethnicity. During the investigation, a racially abusive flyer was left on the truck Messrs. Angeles and Tarango used in carpooling to work. The abusive message on the flyer contained words clipped from newspapers and magazines and the author signed the message "a good friend."

As part of the investigation, Defendant's HR officials interviewed Plaintiff who claimed to know few, if any, of the problems on her crew. Members of Plaintiff's crew, however, complained that the problems were evident but that Plaintiff made no effort to solve them. Defendant claims that, as a result of the investigation, its HR officials concluded that Plaintiff either had misrepresented her knowledge of the **harassment incidents or had abdicated her responsibilities as a supervisor by failing to address them.**

On July 25, 2002, Superintendent Cramer placed Plaintiff under Notice of Investigation. This meant that she was on notice of possible disciplinary action and denied property access pending the result of the investigation.

On August 1, 2002, Superintendent Cramer notified Plaintiff that her performance as a supervisor had been unacceptable and placed her on a "final written counseling and decision-making leave." The stated purpose of this action was to provide Plaintiff with the opportunity to correct her performance and to "commit" to maintaining an acceptable performance level. Plaintiff also was given the opportunity to resign. Defendant informed Plaintiff of certain corrective action expected of her, including the submission of a problem solving and action plan, performing her supervisory responsibilities, and following Defendant's "Guiding Principles", referring to the employee handbook. Defendant also required Plaintiff to meet with Mr. Angeles and her crew to promise no further discrimination, retaliation and favoritism. Plaintiff chose to continue her employment and attempt to correct any performance problems, stating specifically that she "[understood]" and "agree[d]" that failure to meet her responsibilities could result in disciplinary action, including termination of employment.

Plaintiff testified during deposition that part of a Phelps Dodge supervisor's job is to make sure there is no harassment or retaliation with respect to crew members. Plaintiff maintained that she could not have known about the alleged harassment because Mr. Angeles had not reported it to her but had complained only to her supervisor, Superintendent Cramer.

On August 26, 2002, Plaintiff issued ten notices of improper conduct, referred to as "counseling records", to various members of her crew, including Messrs. Angeles and Tarango. Regarding this activity, Plaintiff testified during her deposition that on August 15, 2002, she met with her supervisor Mr. Cramer and asked him what to do about the "mild work mistakes" she had pending concerning certain employees, including Messrs. Angeles and Tarango. Plaintiff testified that Mr. Cramer instructed her to "give them informal coaching." (Doc. 46 at p.5). Plaintiff contends that, considering she was about to be fired, it is inconceivable that she would have written up the documented counseling records

relevant to these employees without Superintendent Cramer's approval. (id.). Defendant on the other hand contends that these numerous counseling records were inappropriate because they did not comply with company guidelines or policy, they exhibited retaliation or preferential treatment, and they were not authorized by Mr. Cramer.

The August 26th counseling records Plaintiff issued can be summarized as follows. Plaintiff issued Mr. Angeles four counseling records, one of which instructed him not to read or play Game Boy or other games on the job. According to Defendant, two Caucasian employees had reported on July 25, 2002 that Mr. Angeles had been reading while on shift. During her deposition Plaintiff initially seemed to state that this counseling record was appropriate but then indicated that it was inappropriate because there had been no investigation or complaint that Mr. Angeles had been playing games while on duty. (Doc. 40, Exh. 1 at 170-71, 175-76). Plaintiff also acknowledged that the "record", issued approximately one month after the alleged incident, could be viewed as untimely. (id., at 178). The other three counseling records Plaintiff issued to Mr. Angeles concerned minor incidents that had occurred within the previous ten days. Plaintiff testified that, based on her "shift notes," Mr. Cramer told her to issue these three counseling records to Mr. Angeles. Defendant contends that all four of the counseling records Plaintiff issued to Mr. Angeles were inappropriate, the records could have been perceived as retaliation and that, even if Mr. Cramer had authorized their issuance, Plaintiff had the responsibility to raise concerns about their propriety with Mr. Cramer or the Human Resources Department.

Plaintiff issued two counseling records to Mr. Tarango on August 26. One of the records concerned an incident that had occurred on July 2, 2002. Mr. Cramer does not dispute that he instructed Plaintiff to issue this counseling record but states that he did so immediately after the July 2 incident. Plaintiff testified during her deposition that she could not recall whether Mr. Cramer had instructed her to issue the counseling record and that this record was untimely. (Doc. 40, Exh. 1 at 197, 203). Plaintiff's second counseling record issued to Mr. Tarango was an "informal coaching" based on his alleged improper operation of the dispatch buttons on his truck on August 24, 2002. Plaintiff testified that this incident

was referenced in her shift notes and she received instructions from Mr. Cramer to issue the counseling record. Superintendent Cramer denies instructing Plaintiff to issue this second counseling record to Mr. Tarango, stating that between the time of the incident on August 24, 2002 and the counseling record on August 26, he and Plaintiff were not at the workplace at the same time.

On the same day as Plaintiff issued the counseling records to Messrs. Angeles and Tarango, Plaintiff gave C.J. Turner an "informal coaching" for a missed work shift instead of the more serious "first written counseling record" required by company guidelines. Ms. Turner was a Caucasian shovel operator on Plaintiff's crew who was working as a substitute on another crew but had failed to show up for work. Plaintiff maintains that she did not violate company procedure regarding this incident. Plaintiff explained the informal coaching by stating that she expected the other shift supervisor to investigate the matter and issue the appropriate disciplinary action, although she was not aware whether two supervisors responding to the same incident was normal company procedure. (Doc. 40, Exh. 1 at 209, 214). Defendant contends that Plaintiff and Ms. Turner are longtime friends, that Plaintiff could have admonished Ms. Turner orally and that Plaintiff showed favoritism toward Ms. Turner by administering her less severe disciplinary action.

Plaintiff's work-related injury on August 16, 2002.

On August 16, 2002, Plaintiff strained her back at work and toward the end of her shift that day reported to the medical clinic. Plaintiff was diagnosed with a strained back and released for immediate return to her duties. Plaintiff did not miss any work in connection with this incident. On August 23, 2002, a member of the Phelps Dodge Safety Department submitted an "Employer's Report on Industrial Injury" concerning the incident to the Industrial Commission of Arizona. Plaintiff did not receive workers' compensation benefits because she did not lose time from work. Plaintiff testified during deposition that she saw the injury report Defendant submitted to the Industrial Commission for the first time on the day of her deposition. Plaintiff testified during deposition that she may have been told about the claim.

Plaintiff received an "informal counseling" record as a result of the back strain incident. Plaintiff testified in her deposition that, following a meeting (manager's review), Superintendent Cramer told her in private, "You are not going to get fired over this, but I would sure like to." Plaintiff understood "this" to mean the underlying back strain incident. Mr. Cramer denies making this comment. (Cramer affidavit, para. 8). Plaintiff testified that there was a "coldness" in the way management treated her around this same time and that the counseling record she received indicated to her that she should not report first-aid related incidents in the future. Plaintiff also testified that the issuance of the counseling record is normal company practice.

Plaintiff's employment termination.

Plaintiff's employment was terminated on August 28, 2002. Defendant contends that the reasons for Plaintiff's termination are twofold. First, based on the racial harassment complaints and Defendant's resulting investigation into the matter, it was determined that Plaintiff either had misrepresented her knowledge of the complaints or had abdicated her supervisory responsibilities by failing to address them. Defendant therefore placed Plaintiff on final warning regarding her employment. Second, while on final warning, Plaintiff issued inappropriate disciplinary records to Messrs. Angeles and Tarango and her action indicated retaliation. She issued an inappropriate "informal coaching" to Ms. Turner, a Caucasian, in violation of company policy and this lesser disciplinary action indicated Plaintiff's favoritism.

At the time of Plaintiff's employment termination, she was one of four Mine Operations supervisors. The other supervisors were Brian Garrity, Lloyd Murphy and Garnet Sipes. Plaintiff testified during deposition that two male co-employees engaged in inappropriate conduct more serious than hers but their employment was not terminated. Plaintiff identified Mr. Lloyd Murphy who allegedly lived with a female co-employee whom he did not supervise and Mr. Ron Harness who once publicly criticized a group of co-employees who had gathered socially at a bar. Defendant contends that these incidents are not similar to Plaintiff's circumstances because these employees were not on a last-warning and their conduct was not necessarily inappropriate.

Plaintiff also has referenced an August 26, 2002 incident when Ms. Turner allegedly reported to Human Resources that Brian Frank, a fellow crew member, had commented, "The party is at my house if they fire that bitch," referring to Plaintiff. Defendant did not investigate the reported incident or the circumstances surrounding the remark. (DSOF, para. 47). Ms. Tanton of Defendant's HR staff has stated in an affidavit that the comment incident was not investigated because it did not relate to the issue they were investigating at the time and the HR representatives did not have time to look into it. (Tanton affidavit, para. 14).

Plaintiff testified that approximately one year before her employment was terminated, Mine Operations Supervisor Brian Garrity, who at the time was younger than 40 years of age, was made a "senior" supervisor. Plaintiff testified during deposition that she and two of her male colleagues were more deserving of the "senior" designation.

Defendant states that Plaintiff was replaced by Mine Operations Supervisor Lloyd Murphy who is six months younger than Plaintiff. Both were born in 1950. Plaintiff agrees that Mr. Murphy replaced her but speculates that Mr. Garrity "may have filled in for the vacancy left when Plaintiff was fired, showing gender discrimination." (PSOF, para. 48).

Plaintiff claims that, at the time of the employment action in this case, she was four years away from an "old timer's" retirement benefit.

Plaintiff filed an EEOC charge in which she claimed to have been fired from her employment based on age and sex discrimination. On April 29, 2003, the EEOC issued a Dismissal and Notice of Rights.

III.

Discussion.

Defendant has moved for summary judgment on all of Plaintiff's claims. Defendant's motion is supported by a discussion of the facts of this case and applicable case law relevant to each of the claims asserted. Plaintiff's response in opposition contains a factual discussion relevant to her specific argument that genuine issues of material fact preclude summary judgment. Plaintiff's factual discussion focuses on the complaints of racial harassment involving her crew, the counseling reports she issued, and her claim that Superintendent

Cramer approved her issuance of the counseling reports. Plaintiff states the issue as follows: "The main question in the Defendant's Motion for Summary Judgment is 'Could reasonable persons differ about whether or not Supervisor Kent Cramer gave Plaintiff instructions to give the ten documented informal coaching statements to employees, all dated August 26, 2002, or did Plaintiff intend to commit job suicide by making such ten documented informal coachings without Cramer's knowledge or authority?'" (Doc. 46 at 5-6). Plaintiff has not included in her response a discussion of authority relevant to the elements of her claims.

(A) Plaintiff's Age Discrimination Claims (Counts One and Two).

1. The ADEA.

The ADEA makes it "unlawful for an employer . . . to discharge any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1). The plaintiff must establish a prima facie case of discrimination either through evidence showing the employer intended to discriminate or through a presumption arising from proof of the McDonnell factors. Villodas v. HealthSouth Corp., 338 F. Supp. 2d 1096, 1101 (D. Ariz. 2004) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824 (1973) and Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994)). Plaintiff must show that (1) she was over 40 years of age; (2) she was satisfactorily performing her employment responsibilities; (3) she was discharged from her employment; and (4) she was replaced by a substantially younger employee with equal or inferior qualifications. Coleman v. Quaker Oats Co., 232 F.3d 1271, 1281 (9th Cir. 2000); Mundy v. Household Finance Corp., 885 F.2d 542, 545 (9th 1989).

The plaintiff in an employment discrimination case "need produce very little evidence in order to overcome an employer's motion for summary judgment." Chuang v. Univ. of Cal. Davis, Bd. of Trustees, 225 F.3d 1115, 1124 (9th Cir. 2000). The plaintiff need only offer evidence that "gives rise to an inference of unlawful discrimination." Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994) (quoting Lowe v. City of Monrovia, 775 F.2d 998,1005 (9th Cir. 1985)).

The standard summary judgment principles apply, and a shifting burden analysis is used. Rose v. Wells Fargo & Co., 902 F.2d 1417, 1420 (9th Cir. 1990). Throughout, the

plaintiff retains the burden of persuasion. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093 (1981). When a plaintiff alleges disparate treatment, "liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 141, 120 S.Ct. 2097, 2105 (2000) (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 610, 113 S.Ct. 1701 (1993)). If the plaintiff succeeds in making a prima facie showing of illegal discrimination, then the defendant must articulate some legitimate, nondiscriminatory reason for the employee's rejection. Reeves, 530 U.S. at 141, 120 S.Ct. at 2105 (quoting McDonnell, 411 U.S. at 802, 93 S.Ct. at 1824). The burden is one of production, not persuasion, and does not involve a credibility assessment. Reeves, at 142, 120 S.Ct. at 2106 (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509, 113 S.Ct. 2742, 2749 (1993)).

The burden then shifts back to the plaintiff to prove that the legitimate reason proffered by the defendant is a pretext for discrimination. Reeves, at 143, 120 S.Ct. at 2106. A plaintiff may show that the defendant's reason is a pretext either directly by showing that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1062 (9th Cir. 2002) (citing Chuang, 225 F.3d at 1123). The plaintiff may rely on circumstantial evidence to show pretext, but it must be both specific and substantial. Villiarimo, at 1062 (citing Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1222 (9th Cir. 1998)).

2. The ACRA.

Plaintiff has asserted a claim for age discrimination under the Arizona Civil Rights Act ("ACRA") (Count One). The ACRA mirrors the relevant federal language and thus, federal law is persuasive in interpreting the statute. See Timmons v. City of Tucson, 830 P.2d 871, 875 (Ariz. App. 1991); Storey v. Chase Bankcard Services, Inc., 970 F.Supp. 722, 724 (D. Ariz. 1997).

3. Analysis.

Plaintiff's prima facie case.

Defendant contends that Plaintiff has failed to make out a prima facie case of age discrimination and in fact, Plaintiff failed to address the issue in her response. Defendant also points out that Plaintiff admits in her statement of facts that she was replaced by Mr. Murphy who is six months younger than Plaintiff.

"The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*." O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312, 116 S.Ct. 1307, 1310 (1996). It is more difficult to draw an inference of age discrimination if there is not a substantial difference in age between the plaintiff and the replacement employee. Id. The six-month age difference between Plaintiff and Mr. Murphy is insubstantial. An inference that an employment decision was based on age cannot be drawn from the replacement of one worker with another worker insignificantly younger. Id., 517 U.S. at 313, 116 S.Ct. 1307.

Plaintiff may show age discrimination based on other evidence indicating that her employer considered age to be significant. However, Plaintiff in her summary judgment response has not argued any facts in support of her age discrimination claim. Plaintiff has simply argued that a genuine issue of material fact exists regarding whether Mr. Cramer authorized Plaintiff to issue the counseling records. Plaintiff has not identified any facts that link this issue, or her employment termination, to her claim of age discrimination. The Court has no obligation to "scour" the record in search of a genuine issue of triable fact. Keenan v. Allan, 91 F.3d 1275, 1279 (9th Cir. 1996)(it is not the court's task to scour the record in search of a genuine issue of triable fact; the court relies on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment). By failing to refute the defendant's assertions on summary judgment, a plaintiff has conceded those points. Whetzel v. Mineta, 364 F. Supp. 2d 1077, 1083 (D.Alaska 2005).

The Court notes that Plaintiff testified that "she believes she was four years away from an 'old timer's' retirement benefit" when her employment was terminated. (PSOF at para. 52). There are no facts of record that establish that Plaintiff's alleged eligibility for a retirement benefit in four years played a role in the employment decision. See Thornhill Pub. Co. Inc.

v. General Tel. & Electronics Corp., 594 F.2d 730, 738 (9th Cir. 1979)(speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment). Moreover, discharging an employee who is close to retirement, without more, does not violate the ADEA. Hazen Paper Co. v. Biggins, 507 U.S. at 610, 113 S.Ct. 1701. Summary judgment in favor of Defendant on Plaintiff's age discrimination claims under the ADEA and the ACRA is appropriate.

(B) Plaintiff's Sex or Gender Discrimination Claim (Count Three).

The legal principles applicable to a claim of gender discrimination are much the same as that for age discrimination. The plaintiff bears the initial burden of establishing a prima facie case of sex discrimination. Bradley v. Harcourt, Brace and Co., 104 F.3d 267, 280 (9th Cir. 1996). The plaintiff must offer evidence that gives "rise to an inference of unlawful discrimination." Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1220 (9th Cir. 1998) (quoting Burdine at 253, 101 S.Ct at 1093). The plaintiff may rely on the McDonnell factors, and demonstrate (1) that she belongs to a protected class; (2) was qualified for the position; (3) was subject to an adverse employment action, and (4) that similarly situated individuals outside her protected class were treated more favorably or her position was filled by a male. Leong v. Potter, 347 F.3d 1117, 1124 (9th Cir. 2003); Villiarimo, 281 F.2d at 1062.

If plaintiff makes a prima facie case, the burden shifts to the employer to state a legitimate, nondiscriminatory reason for terminating the employee's employment. Burdine, 450 U.S. at 253, 101 S.Ct. at 1093. The plaintiff then must have an opportunity to show that the employer's reasons for the adverse employment decision were a pretext for discrimination. Id. The burden of persuasion remains on the plaintiff. Id. The plaintiff may offer direct evidence or produce "specific" and "substantial" circumstantial evidence that "tends to show the employer's proffered motives were not the actual motives because they are inconsistent or otherwise not believable." Godwin, 150 F.3d at 1222 (citing Bradley, 104 F.3d at 270).

1. Prima facie case.

Plaintiff, who is female and a member of a protected class, suffered an adverse employment action, that is, termination of employment. Because Plaintiff in her response has focused on the circumstances surrounding the alleged racial harassment claims concerning her crew and the events that followed culminating in her employment termination, Plaintiff appears to be contending that she was satisfactorily performing her job, that is, she properly issued the counseling records to members of her crew as directed by Superintendent Cramer. Plaintiff was replaced by Mr. Murphy, a male colleague. Viewing the facts in a light most favorable to Plaintiff, she has presented a prima facie case of sex discrimination.

2. Defendant's legitimate nondiscriminatory reason for the employment action.

Defendant contends that Plaintiff's employment was terminated based on legitimate non-discriminatory reasons. Defendant's facts show that the investigation into the claims of racial harassment on Plaintiff's crew revealed that Plaintiff had neglected her supervisory duties. Plaintiff was issued a final written warning which notified her that she could not discriminate, retaliate, or show favoritism toward members of her crew and that she must follow the company's Guiding Principles. Within four weeks of this action, Plaintiff issued corrective notices to the two Hispanic employees who had complained of racial harassment. One of the notices issued to Mr. Angeles was unfounded and untimely and one of the notices issued to Mr. Tarango was untimely. In addition, Plaintiff issued a lesser form of discipline to Ms. Turner, her Caucasian friend, thereby indicating favoritism. Based on this explanation, together with evidence of the written warning and the counseling records, Defendant has articulated a legitimate nondiscriminatory reason for terminating Plaintiff's employment.

3. Pretext.

The issue is whether at this stage on summary judgment proceedings Plaintiff has demonstrated the existence of evidence to create a genuine issue of material fact as to whether the reasons proffered by Defendant for terminating her employment were a pretext for discrimination. Plaintiff has not argued in her response any facts except for claiming that a jury needs to decide whether she was authorized to issue the counseling records and that a favorable finding on that issue could be considered as evidence of discrimination. Plaintiff

has not identified any facts that indicate that Defendant's reasons for the employment action were pretextual. Plaintiff's failure to refute the defendant's assertions on summary judgment results in a concession on the point. Whetzel, 364 F. Supp. 2d at 1083.

Regarding any inference that might be drawn from Mr. Garrity's "senior designation" which occurred when he was less than 40 years of age, this event occurred approximately one year prior to Plaintiff's employment termination. It therefore is too remote to be considered as circumstantial evidence of pretext. See Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1092 (11th Cir. 2004)(in sex discrimination case evidence that plaintiff did not receive promotion in November 1999 was too remote to be linked to plaintiff's employment termination in February 2001). Plaintiff testified on deposition that there actually was not a "senior supervisor" position for Mr. Garrity but he got the title, although his job was the same as Plaintiff's, and possibly more pay. (Doc. 40, Exh. 1 at 62). Such speculation is not sufficient to support a claim of sex discrimination.

Plaintiff does state in her statement of facts that she was replaced by a male resulting in no female supervisors. This fact is not sufficient where a plaintiff has failed to show that all of the purported reasons for the employment action were pretextual. Walker v. Board of Regents of University of Wisconsin System, 410 F.3d 387, 395 (7th Cir. 2005).

In this case, Plaintiff testified during deposition that, regarding one of the counseling records issued to Mr. Angeles on August 26th, she did not investigate the reported incident that Mr. Angeles was reading on the job. She simply told Mr. Angeles that it had been reported and that reading on the job was not permitted. (Doc. 40, Exh. 1 at 166-67). She further testified that besides telling him that reading on the job was not permitted, she also told him "no Game Boys and stuff like that." (id., at 167). When asked about this reference to Game Boy, Plaintiff testified that no one had reported to her that Mr. Angeles had been playing Game Boy or any other game. Plaintiff also had not known Mr. Angeles to play Game Boy or any other games on the job. (id., at 170-71). Plaintiff claimed she had given Mr. Angeles an "informal couching" as directed by Mr. Cramer but "it was the wrong form to use". When asked if there was a correct form, Plaintiff answered "probably not." (id., at

175). Plaintiff also testified that it was not her practice to wait a month before taking action regarding a member of her crew, she personally did not think it was a good idea to issue Mr. Angeles the counseling, and that she was not surprised to learn that Mr. Angeles viewed the counseling as retaliatory. (id., at 178-79).

When asked about the August 26th first written counseling record issued to Mr. Tarango involving an incident that had occurred on July 2nd, Plaintiff was unable to explain why the counseling record had occurred. Plaintiff could not recall a discussion with Mr. Cramer in which he directed her to issue the counseling record or with anyone else. (Doc. 40, Exh. 1, at 201-02). Plaintiff did not "view" the counseling record as untimely but answered yes when asked if it was in fact untimely. (id., at 202-03). Plaintiff did not see this "as a problem", testifying that she had "so much on [her] mind that she didn't pay any attention." (id., at 203).

These undisputed facts evidence that Plaintiff on her own issued inappropriate counseling records to two members of her crew. This activity justified Defendant's employment termination decision as to Plaintiff, a supervisor on final written warning regarding her work performance. Defendant's motion for summary judgment on Plaintiff's claim of sex discrimination is granted.

(C) Plaintiff's Retaliation Claim based on A.R.S. § 23-1501(3)(c)(iii) (Count Four).

Plaintiff's retaliation claim is based on allegations that the adverse employment action occurred in response to her exercise of her rights under Arizona's worker's compensation laws. Defendant contends in its reply that Plaintiff's response on summary judgment did not address her retaliation claim and this omission should be construed as a concession.

Arizona statutes bar employment termination in retaliation for an employee's exercising rights under the workers' compensation statutes. A.R.S. § 23-1501 (3)(c)(iii). Plaintiff's claim is for wrongful discharge based on retaliation. Thompson v. Better-Bilt Aluminum Products Co., Inc., 927 P.2d 781, 787 (Ariz. App. 1996)("[t]ermination in retaliation for filing a workers' compensation claim can serve as the basis for a cause of action for wrongful discharge"). A plaintiff may establish a prima facie case of retaliation

by showing that he or she engaged in a protected activity, suffered an adverse employment decision, and that there was a causal link between the protected activity and the adverse employment decision. Villiarimo, 281 F.3d at 1063 (citing Yartzoff v. Thomas, 809 F.2d 1371, 1375 (9th Cir. 1987)); Chaboya v. Am. Nat'l Red Cross, 72 F. Supp. 2d 1081, 1093 (D. Ariz. 1999). Filing a workers compensation claim is a protected activity. Thompson, 927 P.2d at 787.

As Defendant has pointed out, Plaintiff did not address the retaliation claim in her summary judgment response. Plaintiff therefore has conceded Defendant's argument. Defendant is entitled to summary judgment on Plaintiff's retaliation claim.

Accordingly,

IT IS ORDERED that Defendant's motion for summary judgment as to all of Plaintiff's claims (Doc.39) is granted.

IT IS FURTHER ORDERED that Judgment shall be entered accordingly.

DATED this 26th day of September, 2005.

Mary H. Murguia
United States District Judge